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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 987

TWYEFFORT, INC.,

Petitioner,

—against—

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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OTHER AUTHORITIES CITED

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Twyeffort, Inc., respectfully prays for the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that Court, entered January 16, 1947, affirming a judgment of the United States District Court for the Southern District of New York, entered July 8, 1946, enjoining the defendant from violating Sections 15(a)(1), 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938 (29 U. S. C. A. §§215(a)(1), 215(a)(2) and 215(a)(5)).

SUMMARY STATEMENT OF MATTER INVOLVED

Central Issue in This Case

The central issue in this case, which was tried in the District Court (fols. 49-50), argued in the Circuit Court of Appeals (Opinion,[1] p. 638) and upon which we seek review by this Court, is whether certain outside tailors who have varying numbers of employees of their own, who are in association or partnership with other tailors and who do work for other tailoring establishments similar to that done for the petitioner and while working for the petitioner, are employees of the petitioner (which is a small custom tailor) within the meaning of the "suffer or permit to work" clause of the Fair Labor Standards Act or whether they are independent contractors.

The District Court held that *all* of the outside tailors who did work for the defendant were its employees (fols. 2125-2132). The Circuit Court of Appeals, without modifying the injunction in any respect, nevertheless held that *some* of the outside tailors were independent contractors and *some* were employees (Opinion, pp. 639-640), but held that "Drawing the line between employees and independent contractors" is to be determined by "where a horse's tail begins and where it ceases" (Opinion, p. 640).

We should like to have this Court review, therefore, the question as to whether Congress intended by the "suffer or permit to work" clause of the Fair Labor Standards Act thus to create a standard for determining coverage under the Act as nebulous as "where a horse's tail begins and where it ceases", thereby subjecting employers, such as

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1 We shall refer in this Petition and in the accompanying Brief to the printed page numbers of the opinion of the Circuit Court of Appeals below as it is printed and made part of the transcript of the record certified to this Court.

the petitioner in the instant case, to the risks of the drastic penalties provided in Section 16 of the Act or of the even more drastic contempt penalties for violation of an injunction issued pursuant to Section 17 of the Act, without enabling an employer to ascertain with reasonable certainty who are his employees and who are independent contractors. The decision by the Circuit Court of Appeals has sanctioned just such a result.

We do not believe that Congress intended any such result when it included the "suffer or permit to work" clause in the Act (See our Brief, pp. 33-36 *infra*). Accordingly, we request this Court to review the decision of the Circuit Court of Appeals below.

District Court Proceedings

This action was commenced on April 22, 1944 by the filing of the complaint (fols. 7-27) in the office of the Clerk of the United States District Court for the Southern District of New York. Issue was joined on June 3, 1944 by the service and filing of the defendant's answer (fols. 28-35). The action was tried on October 1, 2, 3, 4 and 5, 1945 before Honorable William Bondy (fol. 3). The decision of the District Court, in favor of the plaintiff and against the defendant, was rendered March 14, 1946 (fols. 2074-2094). Judgment was entered July 8, 1946 (fols. 2125-2132). The District Court on August 26, 1946 denied the defendant's motion to amend the judgment, findings of fact and conclusions of law (fols. 2182-2186).

Circuit Court of Appeals Proceedings

The defendant's notice of appeal to the Circuit Court of Appeals was filed September 5, 1946 (fols. 2188-2193). The case was docketed in that Court on November 8, 1946 and

was argued before a bench consisting of Circuit Judges Learned Hand, Chase and Frank on December 2, 1946. The decision of the Circuit Court of Appeals was rendered January 16, 1947, affirming the judgment of the District Court in an opinion by Circuit Judge Frank. The judgment of the Circuit Court of Appeals was entered January 16, 1947. The issuance of the mandate by the Circuit Court of Appeals was stayed by an order of Circuit Judge Learned Hand on January 22, 1947, pending the disposition of this case by the Supreme Court. On February 4, 1947, there were filed in this Court the within petition for certiorari, a supporting brief, a transcript of the record, and a motion to advance the argument of the instant case (if certiorari is granted) to be heard with No. 562, *Rutherford Food Corporation* v. *Walling*, in view of the similarity of the questions presented in the two cases.

Statute Involved

The statute involved is the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C. A. §201, *et seq.*). The instant action was instituted pursuant to Section 17 of the Act (fol. 11) to enjoin the defendant from violating Sections 15(a)(1), 15(a)(2) and 15(a)(5) of the Act (fol. 11). The injunction issued by the District Court (fols. 2125-2132), in addition to enjoining violations of Sections 15(a)(1), 15(a)(2) and 15(a)(5) of the Act, necessarily enjoins also violations of Sections 6, 7 and 11(c) of the Act (Opinion, p. 634n).

Also involved in this case are the following definitions found in Section 3 of the Act:

> "(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * * "

"(e) 'Employee' includes any individual employed by an employer * * *."

"(g) 'Employ' includes to suffer or permit to work."

Summary of the Evidence

The defendant has eight inside employees on its own premises (fol. 2099) and employs two homeworkers who are duly licensed as such by the New York State Department of Labor (fol. 2105; Ex. 11). The plaintiff does not contend that the defendant is violating the Act with respect to its inside employees and the homeworkers; indeed, there is no dispute that they are employees of the defendant and are treated as such by the defendant (fols. 54-59).

In addition to the inside tailors and homeworkers, there are approximately sixteen outside tailors who also do work for the defendant (fols. 2080, 2100). The outside tailors have worked for the defendant over long periods of time, in some instances for three decades or more (fols. 154, 458, 768, 1154-1155, 1583). They work pursuant to an implied contract (fols. 878-879) by the terms of which the defendant agrees to pay a stipulated price for each completed garment when it is returned (fols. 171, 373, 460, 728). Work on a single garment extends over a period of many months or a year (fol. 1653) and payment is not received by the outside tailors until many months or a year after completion of the garment (fols. 1645-1646). Their work is carried on in shops either built or owned by the outside tailors (fols. 785-786) or rented by them (fols. 162, 425, 734-735, 1586-1587). In some instances the defendant helps the outside tailors defray the expenses of their shops by paying to them, by way of a bonus or inducement (fols. 1485, 1707), monthly allowances over and above their piece work contract price; these monthly allowances have never been earmarked for any specific expenses (fols. 298, 423, 1627) and the outside tailors are free

to use this money for anything they wish, including payment of grocery bills or rent on their own homes (fols. 298, 1627). Each outside tailor either provides his own equipment (fols. 163-169, 362, 466-468, 820-823, 943-944, 1593)[2] or rents it from someone other than the defendant (fol. 739); while this equipment is neither elaborate, nor greatly valuable, it is all the outside tailors "need for tailoring" (fols. 792, 1593). Replacement and maintenance of this equipment is paid out of the outside tailors' own pockets (fols. 265, 514, 817). In the case of the defendant's inside employees, their equipment is supplied, maintained and replaced by the defendant, not by the workers (fol. 824).

Work done by the outside tailors for the defendant is entirely free of supervision from the time the material is received by the outside tailors until the assembled garment is returned to the defendant (fols. 247, 1147, 1327, 1626), whereas the work done by the inside employees is subject to special supervision (fols. 1206-1207), with the defendant exercising over the inside employees the usual authority with respect to wages, hours, hiring, firing, etc. (fols. 1141-1143). Work done by the inside tailors is in no way comparable to that done by the outside tailors (fols. 1206-1207). Usually the garments are completely sewed, pressed and finished by the outside tailors (fols. 1157-1158) and returned by them to the defendant for delivery to the customer without the necessity of an intermediate try-on (fol. 1626). The chalk marks on the material constitute a code of instructions to the outside tailors, with the tag attached to the garment supplementing those instructions only in

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2 The District Court quite appropriately observed at the trial that there was no dispute with respect to the fact that the outside tailors provide their own equipment (fol. 821):

> "The Court: I mean there is absolutely no question about that. They use their machinery, they use their own equipment, their own sewing machine. That is undisputed, so I will take that for granted."

the case of deviations from the standard garment (fols. 364-368, 598-619, 788-789, 852-853, 1156-1166); ninety per cent of the garments assembled by the outside tailors are standard and require no instructions to the outside tailors other than the initial chalk marks (fol. 864). The manner in which the work is to be done and the arrangement of hours is entirely up to the outside tailors (fols. 828-829, 870-871, 1588-1589); the defendant has no knowledge whatever of the working hours of the outside tailors (fols. 226, 376-378, 475, 751, 1663); lunch hours (fol. 1652) and vacations (fols. 301-302, 496-498, 870-871, 1637-1643) are taken by the outside tailors when, as and if they please, with no vestige of control over such matters by the defendant. The outside tailors are free to, and actually do, refuse to do work for the defendant, particularly when there is a rush job with a time limit specified (fol. 1661).

The most important evidence, from the standpoint of a determination of the issue as to whether the outside tailors are independent contractors or employees, is that showing the extent to which the outside tailors employ persons to work for them, are in association or partnership with other tailors and do work for other tailoring establishments similar to that done for the defendant and while working for the defendant. The evidence in this case shows, and it is undisputed, that the outside tailors have working for them now, and have had throughout their relations with the defendant, helpers and employees of their own ranging in number from one to fifteen for each outside tailor (fols. 174, 311, 470-471, 504, 634-635, 643-644, 662-665, 667, 671, 872, 1156, 1211-1214, 1854); that the outside tailors are in partnership with other tailors who, not in privity with the defendant, perform work upon the defendant's goods and receive a share of the outside tailors' profits (fols. 1590-1592, 1595-1597, 1629-1632); that they are associated with

other tailors under working arrangements amounting to something less than partnerships but pursuant to which the expenses of their shops are shared (fols. 160, 385-388, 736-737, 752-757, 1633-1636); that they perform work for other tailoring establishments similar to and competitors of the defendant and while working for the defendant (fols. 200-202, 957-1003, 1169, 1212, 1693); that they solicit such work from other tailoring establishments while working for the defendant and are solicited to do work for other tailoring establishments while working for the defendant (fols. 877-878, 965-966); and that their implied contracts with the defendant leaves them completely free to work for other tailoring establishments while working for the defendant (fols. 400-401, 511-512, 877-878, 1681-1682).[3]

The outside tailors in some instances keep their own books and records showing receipts and expenses (fols. 285, 1886-1905; Ex. H). In their Federal income tax returns they represent to the United States Government that they are engaged in tailoring business for themselves and take deductions for business expenses incurred in the operation of their own establishments (fols. 286-295, 568-589, 619-665, 1863-1868; Exhibits C, C-1, C-2, C-3). The outside tailors are free to belong to a trade union or they may decline to do so, as they choose (fols. 439-440, 702-712, 743, 879-890,

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3 During the trial, the District Court correctly observed, and counsel for both plaintiff and defendant agreed, that the legal relationship between the defendant and outside tailors should be determined as much upon the basis of what the parties *may* do, or have the power to do, as upon the basis of what they actually do (fol. 865):

> "The Court: * * * The relationship, that is, the legal relationship will be determined on what the boss can do and what the contractor or employee may do—not what they do but what they may do—the power.
>
> Mr. Timbers: I think that is right.
>
> Mr. Rozen: * * * I think what your Honor said is very, very true and very cogent. I agree with it wholeheartedly * * *."

944-945); in one instance, an outside tailor while working for the defendant belonged to the Journeymen Tailors Union but declined to participate in a strike which took place while he was working for the defendant (fols. 439-440, 448-450).

BASIS OF THIS COURT'S JURISDICTION

The jurisdiction of this Court is invoked pursuant to Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. §347).

The judgment of the Circuit Court of Appeals sought to be reviewed was entered January 16, 1947. The within petition for certiorari was filed February 4, 1947.

QUESTIONS PRESENTED

1. Was the "suffer or permit to work" clause of the Fair Labor Standards Act (29 U. S. C. A. §203(g)) intended to bring within the scope of the Act, as employees of the petitioner, certain outside tailors who employ persons to work for them, who are in association or partnership with other tailors and who do work for other tailoring establishments similar to that done for the petitioner and while working for the petitioner? [*This question was answered in the affirmative by the District Court* (fols. 2086-2094); *it was answered partly in the affirmative and partly in the negative by the Circuit Court of Appeals* (Opinion, pp. 638-640).]

2. Was the "suffer or permit to work" clause of the Fair Labor Standards Act (29 U. S. C. A. §203(g)) intended to create a new wage liability on the part of the petitioner toward certain outside tailors and their employees with

respect to whom there otherwise would be no such liability, or was that clause intended to measure the extent of existing agreed wage liability? [*This question was answered by the District Court in favor of the creation of a new wage liability* (fols. 2086-2089); *it was answered by the Circuit Court of Appeals partly in favor of the creation of a new wage liability and partly in favor of measuring the extent of existing agreed wage liability* (Opinion, pp. 638-641).]

3. Was the "suffer or permit to work" clause of the Fair Labor Standards Act (29 U. S. C. A. §203(g)) intended to establish a standard for determining coverage under the Act as nebulous as "where a horse's tail begins and where it ceases"? [*This question was not passed upon by the District Court; the quoted standard for determining coverage was suggested by the Circuit Court of Appeals* (Opinion, p. 640).]

4. Is an injunction issued pursuant to the Fair Labor Standards Act (29 U. S. C. A. §217), which fails at "drawing the line between employees and independent contractors" with any greater certainty than "where a horse's tail begins and where it ceases", sufficiently fair, definite and feasible to permit compliance therewith by the petitioner? [*This question was not passed upon directly by the District Court, since it regarded all outside tailors as employees of the petitioner* (fols. 2086-2094; 2100; 2120-2121); *the Circuit Court of Appeals, although holding that some of the outside tailors were independent contractors and some were employees of the petitioner, nevertheless answered the question in the affirmative and refused to modify the injunction* (Opinion, pp. 638-640).]

5. May the Administrator of the Wage and Hour Division, United States Department of Labor, at the time of

trial of an action in which he is the plaintiff under the Fair Labor Standards Act (29 U. S. C. A. §217), relying upon the alleged secret and confidential character of a signed statement procured from his principal witness prior to trial, withhold that statement from the defendant's use in cross examining that witness, despite the Administrator's concession that the statement "could have been used to impeach the witness' credibility" and "might have contained some adverse information bearing on the relationship between the witness and appellant" (Administrator's Brief in the Circuit Court of Appeals, p. 22)? [*This question was answered in the affirmative by the District Court which, without examining the statement, sustained the Administrator's objection to the production of the statement on the ground that "the Government may be protecting the man who made the statement. Therefore, it may be regarded as something which should be held secret and confidential"* (fol. 1922); *the Circuit Court of Appeals indicated that the question should be answered in the negative, but stated that "the error was harmless"* (Opinion, pp. 637, 641).]

6. May an error be characterized as harmless, committed by the District Court at the trial of an action under the Fair Labor Standards Act (29 U. S. C. A. §217) in withholding from the defendant's use in cross examining the plaintiff's principal witness a signed statement procured by the plaintiff from that witness prior to trial, on the ground that the Administrator should be permitted to protect the person who made the statement by keeping the statement secret and confidential, especially when the Administrator concedes the relevancy of the statement upon the issue of the witness' credibility and upon the issue of the relationship between the outside tailors and the defendant (the principal issue in the case)? [*The District Court*

had no occasion to pass upon this question as to whether its action constituted harmless error; the Circuit Court of Appeals answered the question in the affirmative (Opinion, pp. 637, 641).]

REASONS FOR ALLOWANCE OF THE WRIT

1. *The Decision by the Circuit Court of Appeals Below Is Believed to Have Raised Questions Under the Fair Labor Standards Act Which Are Strikingly Similar to Those Raised in a Case Now Pending Unargued and Undetermined in This Court.*

On November 12, 1946 this Court granted certiorari in No. 562, *Rutherford Food Corporation* v. *Walling*, to review a decision of the Circuit Court of Appeals for the Tenth Circuit (156 F. (2d) 513) which had reversed a judgment of the United States District Court for the District of Kansas denying an injunction as prayed for by the Administrator. The principal question in the *Rutherford Food* case is whether certain meat boners are employees of a meat plant operator within the meaning of the "suffer or permit to work" clause of the Fair Labor Standards Act or whether they are independent contractors.

There are numerous similarities between the status of the boners in the *Rutherford Food* case (as disclosed in the opinion of the Circuit Court of Appeals for the Tenth Circuit reported in 156 F. (2d) 513) and the status of the outside tailors in the instant case. The boners were paid by the hundredweight of boneless beef turned out and were paid weekly; the outside tailors are paid by the completed garment (fols. 2083, 2107) and it is claimed they are paid every Monday (fols. 2083, 2108). The plant operator furnished to the boners without payment of any rental the

room in which the boning was done; the petitioner is said to pay the outside tailors sums of money with which to defray the rent on their shops (fols. 2081, 2112). The boners did work similar to that done by others who concededly were employees of the plant operator; the outside tailors are said to do work similar to that done by home-workers and inside employees who concededly are employees of the petitioner (fols. 2085, 2105; 54-59). The boners determined their own hours; the outside tailors are at liberty to work whenever they please (fols. 2084, 2109). The boners furnished their own hooks, knives and leather belts; the outside tailors use, maintain and replace their own sewing machines, needles, irons and similar equipment (fols. 2083, 2106). The boners were members of the union; several of the outside tailors are members of the Journeymen Tailors Union (fol. 2114). The plant operator never included the boners in its Workmen's Compensation liability policy and never made any deductions for unemployment compensation or withholding taxes; the petitioner has never made deductions from its payments to the outside tailors for unemployment insurance or social security taxes (fols. 2084-2085, 2105). The boners were found to have worked in excess of the maximum hours per week specified in the Act, without receiving any overtime compensation for the overtime worked, and the plant operator was found not to have kept any records relating to the time the boners actually worked; the petitioner has been held to have employed the outside tailors for work-weeks longer than 40 hours, without compensating them for their employment in excess of 40 hours per week, and to have failed to keep proper records as required by Section 11(c) of the Act (fols. 2117-2119).

The Circuit Court of Appeals for the Tenth Circuit in the *Rutherford Food* case stated (156 F. (2d) 513, 514) that

there were involved in that case precisely the same provisions of the Fair Labor Standards Act as the Circuit Court of Appeals for the Second Circuit in the instant case has indicated are involved herein (Opinion, pp. 634, 638). The argument that it was not intended by the "suffer or permit to work" clause of the Act to create a new wage liability toward persons with respect to whom there otherwise would be no such liability and that the "suffer or permit to work" clause was intended to measure the extent of existing agreed wage liability, was rejected by the Circuit Court of Appeals for the Tenth Circuit (156 F. (2d) 513, 516) as it was by the District Court (fols. 2086-2094) and the Circuit Court of Appeals for the Second Circuit in the instant case (Opinion, pp. 638-640); accordingly, each of the courts mentioned refused to be guided in its construction of the statutory definition of "employee" by any of the standards existing at the time the Fair Labor Standards Act was enacted—standards which had become part of the common understanding of the people as to what constitutes an employer-employee relationship as distinguished from an independent contractor relationship (156 F. (2d) 513, 516; fols. 2086, 2087; Opinion, pp. 638-640).

This Court granted certiorari in the *Rutherford Food* case upon a petition presenting the following questions, in substance:

1. Whether it is the purpose of the Fair Labor Standards Act to create a wage liability to persons as to whom none would otherwise exist or to measure the extent of existing agreed wage liability.

2. Whether the phrase "suffer or permit to work" as used in the Act brings within its meaning persons with whom there is no contractual wage obligation.

3. Whether it is the purpose of the Act to bring employees of an independent contractor into employer-employee relationships with a plant operator on the basis of the work being performed in the plant.

The similarity between these questions in the *Rutherford Food* case and those presented in the instant petition for certiorari (pp. 9-10 *supra*) is so clear as to require no argument.

The petition for certiorari in the *Rutherford Food* case also claimed a conflict between the decision by the Circuit Court of Appeals for the Tenth Circuit in that case and the decisions by the Circuit Courts of Appeals in the following cases:

Bowman v. *Pace Company*, 119 F. (2d) 858 (C. C. A. 5th, 1941);
Helena Glendale Ferry Co. v. *Walling*, 132 F. (2d) 616 (C. C. A. 8th, 1942);
Reconstruction Finance Corp. v. *Merryfield*, 134 F. (2d) 988 (C. C. A. 1st, 1943);
Walling v. *Sanders*, 136 F. (2d) 78 (C. C. A. 6th, 1943);
Walling v. *American Needlecrafts*, 139 F. (2d) 60 (C. C. A. 6th, 1943).

The above listed cases, claimed to be in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in the *Rutherford Food* case, are also among those which are believed to be in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the instant case (pp. 21-25 *infra*).

It may not be inappropriate to point out that factually the instant case is a much stronger independent contractor case, so far as the relationship between the outside

tailors and the petitioner is concerned, than was the *Rutherford Food* case. The boners were subject to far greater supervision and control by the plant operator than is the case with the outside tailors, largely because the boners worked on the plant operator's premises, whereas the outside tailors work in their own shops and perform no services whatever on the petitioner's premises (fols. 2079, 2100). Moreover, the outside tailors have working for them helpers and employees of their own ranging in number from one to fifteen for each outside tailor (fols. 174, 311, 470-471, 504, 634-635, 643-644, 662-665, 667, 671, 872, 1156, 1211-1214, 1854); the outside tailors are in partnership with other tailors who, not in privity with the petitioner, perform work upon the petitioner's goods and receive a share of the outside tailors' profits (fols. 1590-1592, 1595-1597, 1629-1632); and the outside tailors perform work for other tailoring establishments similar to and competitors of the petitioner and while working for the petitioner (fols. 200-202, 957-1003, 1169, 1212, 1693). None of these situations exists with respect to the boners in the *Rutherford Food* case. In substance, the outside tailors carry on their own tailoring businesses, wholly separate and distinct from the business of the petitioner, and therefore are independent contractors in a far more realistic way than were the boners in the *Rutherford Food* case.

We therefore submit that if there is any question as to whether the boners in the *Rutherford Food* case are employees or independent contractors, then *a fortiori* there is a grave question as to whether the outside tailors in the instant case are employees or independent contractors. In any event, since the questions presented by the *Rutherford Food* case have not been argued before this Court and since they are so strikingly similar to those presented by the instant case, we respectfully urge this Court to hear both

cases at one time. Accordingly, we are filing with this petition for certiorari a motion to advance the argument of the instant case so that it may be heard with No. 562, *Rutherford Food Corporation* v. *Walling*.

2. *The Decision by the Circuit Court of Appeals Below Is Believed to Have Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Settled by This Court.*

(A) There was presented squarely to the Circuit Court of Appeals below for determination the question whether the "suffer or permit to work" clause of the Fair Labor Standards Act (29 U. S. C. A. §203(g)) was intended to bring within the scope of the Act, as employees of the petitioner, certain outside tailors who themselves employ persons to work for them, who are in association or partnership with other tailors and who do work for other tailoring establishments similar to that done for the defendant and while working for the defendant. Closely interwoven with this question was the further question, likewise squarely presented to the Circuit Court of Appeals below, whether the "suffer or permit to work" clause was intended to create a new wage liability on the part of an employer toward persons with respect to whom none otherwise would exist, or whether it was intended to measure the extent of existing agreed wage liability. Reduced to their simplest terms, both questions came to this: Were the outside tailors to be regarded as employees of the petitioner or as independent contractors?

The District Court held that the outside tailors were all employees of the petitioner (fols. 2125-2132). The Circuit Court of Appeals held that some of the outside tailors were employees of the petitioner and some were independent

contractors (Opinion, pp. 638-640) but that "Drawing the line between employees and independent contractors" should be determined by the standard of "where a horse's tail begins and where it ceases" (Opinion, p. 640).

This question, so far as we have been able to discover, has not been passed upon by this Court, as indicated by the fact that the Circuit Court of Appeals below did not cite a single decision by this Court (or by any American court, for that matter) in support of its position that certain of the outside tailors are employees of the petitioner and not independent contractors. The absence of any decision by this Court settling this question is emphasized by the reliance of the Circuit Court of Appeals below upon the case of *Guiseppi* v. *Walling*,[5] 324 U. S. 244 (1945), for the proposition that homeworkers have been held to be employees within the meaning of the "suffer or permit to work" clause. Aside from the fact that we find nothing whatever in the *Gemsco* case on the subject of the "suffer or permit to work" clause, it is clear that homeworker cases cannot resolve the question presented in the instant case. Whatever the diversion of opinion between the District Court and the Circuit Court of Appeals below may be as to whether the outside tailors are employees or independent contractors, one thing is clear: They are not homeworkers. This the parties were agreed upon (fols. 54-59); the District Court so held (fols. 2080-2081, 2105-2106); and the Circuit Court of Appeals, while it sought to draw an analogy between the outside tailors and homeworkers, nevertheless recognized that the outside tailors are not homeworkers (Opinion, pp. 638-639). The need for an authoritative determination of this question by this Court would appear to be clear.

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5 Officially reported as *Gemsco, Inc.* v. *Walling*, 324 U. S. 244 (1945).

(B) Another important question which was presented to the Circuit Court of Appeals below for determination was whether an injunction issued under the Fair Labor Standards Act (29 U. S. C. A. §217), which failed to distinguish in its application between employees and independent contractors with any greater certainty than "where a horse's tail begins and where it ceases", was sufficiently fair, definite and feasible to permit compliance therewith by the petitioner. We have found no decision by this Court settling this question and the Circuit Court of Appeals below, in deciding that the injunction was fair, definite and feasible, cited no authority in support of its conclusion.

As a matter of fact, the Circuit Court of Appeals below, in discussing the operation of the injunction, pointed out two illustrations of what we consider the unfairness, indefiniteness and infeasibility of the injunction. Commenting upon the fact that the injunction applies to outside tailors who work not only for the defendant but for other tailoring establishments which are competitors of the petitioner and while working for the petitioner, the Circuit Court of Appeals stated (Opinion, p. 638):

> "The fact that the outside tailors may, and sometimes do, work for more than one employer creates no problem except as it affects the payment of overtime wages. Only if an employee works more than forty hours a week for a particular employer is the latter required to pay overtime. Absent collusion between employers, a tailor could conceivably work eighty hours a week without being entitled to overtime pay, if he divided his time equally between two employers."

While we represent an employer, we cannot believe that Congress intended such a result. An injunction which per-

mits such a result is distinctly unfair, to say nothing of its invitation to collusion.

Another illustration of what we regard as the unfairness, indefiniteness and infeasibility of the injunction, as pointed out by the Circuit Court of Appeals below, is the effect of the injunction upon the employees of the outside tailors (Opinion, pp. 640-641):

> "Defendant contends that the injunction order errs because it includes within its scope the defendant's obligations to the employees of those tailors who are within it. But that issue is not before us, since the order does not mention those sub-employees, and since plaintiff advises us that he has no intention of ever asserting that it relates to them."

If the injunction, which by its terms (fols. 2126-2127) is directed to the "defendant, its officers, agents, servants, employees, attorneys, *and all persons acting or claiming to act in its behalf and interest*", does not include within its scope employees of the outside tailors, then certainly such employees would be subject to the injunction under Rule 65(d) of the Federal Rules of Civil Procedure. The statement by the Circuit Court of Appeals that "plaintiff advises us that he has no intention of ever asserting that it relates to them" can hardly be said to cure this inherent unfairness of the injunction which presumably is intended to survive changes in personnel of the plaintiff's office.[6]

Some indication of the importance of the federal questions involved herein may be seen in the frequency with which the attorneys for the Administrator have advised

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6 For example, we are advised that the Regional Attorney who has been in charge of the instant case for the plaintiff since its inception has resigned effective February 1, 1947.

the courts below that this case is regarded as a test case by which the Administrator intends to establish a standard applicable to one segment of the men's clothing industry.

3. *The Decision by the Circuit Court of Appeals Below Is Believed To Be in Conflict With Other Decisions by Circuit Courts of Appeals on the Same Matter.*

(A) The Circuit Court of Appeals below (Opinion, p. 638), as well as the District Court (fols. 2086-2094), construed the "suffer or permit to work" clause of the Fair Labor Standards Act so as to bring within the scope of the Act, as employees of the petitioner, not only the outside tailors who work for the petitioner, but those who work for other tailoring establishments while working for the petitioner. The decision in this respect is squarely in conflict with that of the Circuit Court of Appeals for the Sixth Circuit in *Walling* v. *Sanders*, 136 F. (2d) 78 (C. C. A. 6th, 1943), where that court said (p. 81):

> "The usual test by which, in common experience, men determine the employer, is to ascertain who has authority on his own account to 'hire and fire.' But the administrator urges that the term 'employee' as here used is not a word of art but one carefully defined by the statute. He refers to §3(e) of the Act which defines 'employee' as any individual employed by an employer, and §3(g) which defines 'employ' to mean 'to suffer or permit to work.' Since the appellee suffers or permits drivers to work for its salesmen, ipso facto they work for it. This likewise does not follow. In so broadly defining the word 'employ'

> Congress undoubtedly had a purpose to relieve complainants of the necessity of proving a contract of employment. *The administrator desires us to construe employees so as to include not only those who work for an accused employer, but also those who work for anybody else. Manifestly this would encompass all employed humanity.*" (Emphasis added.)

(B) The Circuit Court of Appeals below, to the extent that it construed the "suffer or permit to work" clause of the Fair Labor Standards Act as requiring the petitioner to pay wages specified under the Act to certain of the outside tailors (Opinion, pp. 638-640), as likewise did the District Court (fols. 2086-2094, 2120-2121, 2128), construed that clause of the Act so as to create a new wage liability by the petitioner toward persons with respect to whom none otherwise would have existed, and thereby declined to construe that clause of the Act as measuring the extent of existing agreed wage liability. The decision in this respect is squarely in conflict with that of the Circuit Court of Appeals for the Fifth Circuit in *Bowman* v. *Pace,* 119 F. (2d) 858 (C. C. A. 5th, 1941), where that court said (p. 860):

> "It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law. * * *"

The decision by the Circuit Court of Appeals below in this respect likewise is in conflict with that of the Circuit Court of Appeals for the First Circuit in *Reconstruction Finance Corporation* v. *Merryfield,* 134 F. (2d) 988 (C. C. A. 1st, 1943), where that court said (pp. 991-992):

"The cases are legion which have defined and commented upon the traditional concept of the employer-employee relationship. As was said in Williams v. United States, 7 Cir., 1942, 126 F. 2d 129, 132: 'There seems to be no dispute but that the employer-employee relationship exists only where the person, for whom the work is done, has the right to control and direct the work, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. Singer Mfg. Co. v. Rahn, 132 U. S. 518, 10 S. Ct. 175, 33 L. Ed. 440; Jones v. Goodson, 10 Cir., 121 F. 2d 176, 179.' Madison v. Phillips Petroleum Co., 5 Cir., 1937, 88 F. 2d 515, certiorari denied 301 U. S. 703, 57 S. Ct. 946, 81 L. Ed. 1358; McLamb v. E. I. Dupont de Nemours & Co., 4 Cir., 1935, 79 F. 2d 966; Commissioner of Internal Revenue v. Modjeski, 2 Cir., 1935, 75 F. 2d 468.

* * * * *

We may say in passing that two cases recently decided, Bowman v. Pace Co., supra, and Maddox v. Jones, D. C. 1941, 42 F. Supp. 35, take the view that Congress did not intend to create new wage liabilities or to change the familiar rules laid down for the determination of the employer-employee relationship."

(C) The Circuit Court of Appeals below (Opinion, p. 638), as well as the District Court (fols. 2084, 2109), construed the "suffer or permit to work" clause of the Fair Labor Standards Act so as to bring within the scope of the Act, as employees of the petitioner, outside tailors over whose hours of work the petitioner concededly has no control whatever. The decision in this respect is squarely in conflict with that of the Circuit Court of Appeals for

the Eighth Circuit in *Helena Glendale Ferry Co.* v. *Walling*, 132 F. (2d) 616 (C. C. A. 8th, 1942), where that court said (p. 620):

> "The Act defines an employee as 'any individual employed by an employer', and the word 'employ' as used in the Act includes 'to suffer or permit to work.' But since the obvious purpose of the Act is to establish minimum wages and maximum hours, the words last quoted can not be interpreted to include as an employee one over whose hours of labor the employer has no control, and to whom the employer is under no obligation to pay wages. * * *"

(D) The Circuit Court of Appeals below (Opinion, pp. 638-640), as well as the District Court (fols. 2086-2094), gave to the "suffer or permit to work" clause of the Fair Labor Standards Act a literal construction so as to bring within the scope of the Act, as employees of the petitioner, certain outside tailors who otherwise would not conceivably be regarded as employees of the petitioner. The decision in this respect is squarely in conflict with that of the Circuit Court of Appeals for the First Circuit in *Walling* v. *Portland Terminal Co.*, 155 F. (2d) 215 (C. C. A. 1st, 1946), where that court said (p. 218):

> "There is no question but what this statute should be liberally construed for it is remedial and humanitarian legislation. Fleming v. Palmer, 1 Cir., 1941, 123 F. 2d 749, 762, certiorari denied 316 U. S. 662, 62 S. Ct. 942, 86 L. Ed. 1739. And the definition of employees is certainly a very comprehensive definition. United States v. Rosenwasser, 1945, 323 U. S. 360, 362, 65 S. Ct. 295. *But we do not believe that Congress intended to give to the term 'employee' the expansive*

scope that a literal construction of the words 'suffer or permit to work' would compel. We cannot infer that Congress intended the absurdities that such a construction would breed." (Emphasis added.)

This Court granted certiorari in the *Portland Terminal* case on October 14, 1946, and the case was argued in this Court on January 17, 1947.

4. *The Decision by the Circuit Court of Appeals Below Is Believed to Have Sanctioned a Departure by the District Court so Far from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.*

At the trial, the witness Margolin testified that he gave to representatives of the plaintiff a signed statement relating to the instant case (fols. 1909-1910). In response to the trial court's inquiry as to whether the Margolin statement was in the possession of the plaintiff at the time of the trial, counsel for the plaintiff replied in the affirmative (fol. 1911) but objected to the production of the statement for inspection by the defendant's counsel (fol. 1912). The trial court sustained the plaintiff's objection on the ground that "the Government may be protecting the man who made the statement. Therefore it may be regarded as something which should be held secret and confidential" (1922). The trial court, however, did not examine the Margolin statement to determine whether it was of a secret and confidential nature, but merely accepted the conclusion of the plaintiff's counsel in this respect. The defendant duly excepted to the trial court's ruling (fol. 1925).

In the Circuit Court of Appeals, we contended that the refusal of the District Court to permit the defendant to examine the Margolin statement constituted prejudicial

error. The plaintiff, in his brief filed in the Circuit Court of Appeals, conceded that "As to the Margolin statement, presumably it could have been used to impeach the witness' credibility" and "the statement conceivably might have contained some adverse information bearing on the relationship between the witness and appellant" (Plaintiff's Brief, p. 22). We regard these concessions on the part of the plaintiff as significant, particularly since the Margolin statement is in the hands of the plaintiff only and never has been seen by the Circuit Court of Appeals, the District Court or by the defendant (fols. 1909-1925), in view of the ruling by the District Court that the Margolin statement should be regarded "as something which should be held secret and confidential" (fol. 1922).

The Circuit Court of Appeals below (Opinion, p. 641) recognized the error committed by the District Court in the exclusion of the Margolin statement and held that the doctrine of *United States* v. *Andolschek,* 142 F. (2d) 503 (C. C. A. 2d, 1944), and *United States* v. *Beekman,* 155 F. (2d) 580, (C. C. A. 2d, 1946), applies in civil as well as in criminal cases.[7] The Circuit Court of Appeals below held, however, that the error was harmless, since the facts to which Margolin testified so far as relevant, were not in dispute. We believe that even a cursory examination of the testimony of Margolin in this case will disclose that the facts to which he testified were sharply in dispute and the issue of Margolin's credibility was one of the critical issues in the case. (See our Brief, pp. 48-55 *infra.*)

We regard as serious error the practice of the District Court, as sanctioned by the Circuit Court of Appeals below, in permitting the Administrator at the time of trial,

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7 At the time of the argument of the instant case in the Circuit Court of Appeals below, Judge Learned Hand stated: "I should welcome an occasion for the Supreme Court to pass upon the doctrine of the *Andolschek* and *Beekman* cases which still is in a state of evolution."

relying upon the alleged secret and confidential character of a signed statement procured from his principal witness prior to trial, to withhold that statement from the defendant's use in cross-examining that witness, despite the Administrator's concession that the statement was relevant upon the issue of the witness' credibility and the issue of the relationship between the outside tailors and the defendant. Accordingly, we respectfully submit that this departure by the District Court so far from the accepted and usual course of judicial proceedings, as sanctioned by the Circuit Court of Appeals below, is such as to call for an exercise of this Court's power of supervision.

PRAYER

For the reasons outlined above, developed more in detail in the accompanying brief, your petitioner prays that a writ of certiorari issue out of this Court to the United States Circuit Court of Appeals for the Second Circuit and that the duly certified copy of the transcript of the proceedings below which accompanies the petition herein shall be treated as though filed in response to the aforesaid writ, to the end that this cause may be reviewed and determined by this Court; that the final judgment of the Circuit Court of Appeals may be reversed; and that the petitioner may be granted such other and further relief as this Court may deem proper.

Dated: New York, N. Y., February 4, 1947.

WILLIAM H. TIMBERS
Attorney for Petitioner
15 Broad Street
New York, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No.

TWYEFFORT, INC.,

Petitioner,

—against—

L. METCALFE WALLING, ADMINISTRATOR of the WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Second Circuit has not been officially reported as of the date of this brief. A printed copy of said opinion is annexed to the certified transcript of the record filed herein and bears printed page numbers 633 through 641.

The opinion of the United States District Court for the Southern District of New York appears in the certified transcript of the record filed herein (fols. 2074-2094). The said opinion has been officially reported in 65 F. Supp. 920.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. §347).

The judgment of the Circuit Court of Appeals sought to be reviewed was entered January 16, 1947. The within petition for certiorari was filed February 4, 1947.

STATEMENT OF THE CASE

A summary statement of the matter involved herein is set forth in the petition for certiorari at pages 2-9 *supra*. A summary of the argument is set forth in the index.

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C. A. §201, *et seq.*). The instant action was instituted pursuant to Section 17 of that Act (fol. 11) to enjoin the defendant from violating Sections 15(a)(1), 15(a)(2) and 15(a)(5) of the Act (fol. 11). The injunction issued by the District Court (fols. 2125-2132), in addition to enjoining violations of Sections 15(a)(1), 15(a)(2) and 15(a)(5) of the Act, necessarily enjoins also violations of Sections 6, 7 and 11(c) of the Act (Opinion, p. 634n).

Also involved in this case are the following definitions found in Section 3 of the Act:

> "(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * * "

"(e) 'Employee' includes any individual employed by an employer * * *."

"(g) 'Employ' includes to suffer or permit to work."

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred

1. In construing the "suffer or permit to work" clause of the Fair Labor Standards Act (29 U. S. C. A. §203(g)) so as to bring within the scope of the Act, as employees of the petitioner, certain outside tailors who employ persons to work for them, who are in association or partnership with other tailors and who do work for other tailoring establishments similar to that done for the petitioner and while working for the petitioner.

2. In construing the "suffer or permit to work" clause of the Fair Labor Standards Act (29 U. S. C. A. §203(g)) so as to create a new wage liability on the part of the petitioner toward certain outside tailors and their employees with respect to whom there otherwise would be no such liability, rather than construing that clause so as to measure the extent of existing agreed wage liability.

3. In construing the "suffer or permit to work" clause of the Fair Labor Standards Act (29 U. S. C. A. §203(g)) as establishing a standard for determining coverage under the Act as nebulous as "where a horse's tail begins and where it ceases".

4. In condoning the action of the District Court which issued an injunction pursuant to the Fair Labor Standards Act (29 U. S. C. A. §217) which failed at "drawing the line

between employees and independent contractors" with any greater certainty than "where a horse's tail begins and where it ceases" and in holding such an injunction to be sufficiently fair, definite and feasible to permit compliance therewith by the petitioner.

5. In condoning the action of the District Court which permitted the Administrator at the time of trial of an action in which he was the plaintiff under the Fair Labor Standards Act (29 U. S. C. A. §217), relying upon the alleged secret and confidential character of a signed statement procured from his principal witness prior to trial, to withhold that statement from the defendant's use in cross examining that witness, despite the Administrator's concession that the statement was relevant upon the issue of the witness' credibility and upon the issue of the relationship between the outside tailors and the defendant.

6. In holding that the error committed by the District Court, referred to in specification 5 above, to be harmless error.

ARGUMENT

POINT I

The "suffer or permit to work" clause of the Fair Labor Standards Act does not operate to include the outside tailors within the scope of the Act.

As originally reported to the House, the Fair Labor Standards Act defined "employee" as "any individual employed or suffered or permitted to work by an employer". 83 Cong. Rec. 7373-4 (1938). The Act as passed and signed by the President defines "employee" as "any individual employed by an employer". 29 U. S. C. A. §203(e). The "suffered or permitted to work" part of the definition of an employee in the original draft of the Act was dropped from the definition of employee in the Act as passed and signed; this clause as now found in the Act serves only to expand the definition of "employ" so that it "includes to suffer or permit to work". 29 U. S. C. A. §203(g). The significance of this transposition of the "suffer(ed) or permit(ted) to work" clause from the definition of "employee" in the draft of the Act to a characterization of the term "employ" in the final Act is just this: After due deliberation Congress decided that the Act should be restricted in its application to employer-employee relations as determined "by the standards fixed by law" (*Bowman* v. *Pace Co.*, 119 F. (2d) 858, 860 (C. C. A. 5th, 1941) and that *once the employer-employee relationship is found "by the standards fixed by law"* to exist, then the "suffer or permit to work" clause, "by broadening the meaning of employment to include suffering or permitting a person to work, precludes any defenses based upon the allegedly voluntary and unauthorized performance of overtime work or of

gratuitously rendered service—defenses which were raised successfully in the early years of maximum hour regulation." 2 C. C. H. Labor Law Serv. par. 23,676. Cases which have construed the "suffer or permit to work" clause of the Act bear out the intention of Congress in this respect.

In *Johnson* v. *Dierks Lumber & Coal Co.*, 130 F. (2d) 115, 118 (C. C. A. 8th, 1942), the "suffer or permit to work" clause was invoked in an employee's suit for overtime wages to eliminate the employer's defense based upon an agreement with the employees that they should not work more than six hours per day. The court held that Section 3(g) of the Act precluded such a defense since the employees were suffered or permitted to work overtime.

In *Walling* v. *Sanders*, 136 F. (2d) 78, 81 (C. C. A. 6th, 1943), the court held that the purpose of Congress in defining the word "employ" as including "suffer or permit to work" was to eliminate an employer's defense based upon the absence of a contract of employment. The court in the *Sanders* case rejected a contention of the Administrator similar to that of the plaintiff in the instant case, namely, that there should be included among the employees of the defendant in the instant case not only the outside tailors who work for the defendant alone but those who work at the same time for other tailoring establishments (136 F. (2d) 78, 81):

> "The administrator desires us to construe employees so as to include not only those who work for an accused employer, but also those who work for anybody else. Manifestly this would encompass all employed humanity."

In *Local No. 6167* v. *Jewell Ridge Coal Corporation,* 145 F. (2d) 10 (C. C. A. 4th, 1944), aff'd 325 U. S. 161 (1945), it was held that once an employer-employee relationship had been established, the employer could not successfully defend an employee's suit for overtime compensation on the ground that traveling time from portal to portal, not being devoted to actual physical labor, should not be included in a coal miner's work week. The court viewed the "suffer or permit to work" clause, among others, of the Act (145 F. (2d) 10, 11):

> "* * * as necessarily indicative of a Congressional intention to guarantee either regular or overtime compensation for all actual work or employment. To hold that an employer may validly compensate his employees for only a fraction of the time consumed in actual labor would be inconsistent with the very purpose and structure of those sections of the Act."

In *Armour & Co.* v. *Wantock,* 323 U. S. 126, 132 (1944), this Court construed the "suffer or permit to work" clause of the Act in an employee's suit for overtime compensation to deprive the employer of the defense that time spent by employees in idleness or relaxation should not be counted as working time. It should be noted that Section 3(g) of the Act was interpreted as broadening the scope of "employ", *once the employer-employee relationship was conceded.*

Likewise in *United States* v. *Rosenwasser,* 323 U. S. 360, 362 (1945), Mr. Justice Murphy's characterization of the coverage extended to "employees" under the Act as "A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame" must be considered in the context in which the statement

was made, namely, a holding that the "suffer or permit to work" clause, among others, of the Act, was intended to eliminate the employer's defense that employees compensated on a piece rate basis rather than on an hourly basis were not included within the coverage of the Act. Again, the employer-employee relationship was conceded and the only issue was whether work done by such employees on a piece rate rather than on an hourly basis was within the scope of the Act in view of the "suffer or permit to work" clause.

The construction of the "suffer or permit to work" clause of the Act for which we are contending, namely, that it was intended to broaden the scope of the term "employ" under the Act by eliminating certain of the employer's defenses *once the employer-employee relationship had been established,* appears to have been adopted by the Administrator in the case of *Walling* v. *Wolff,* 65 F. Supp. 532 (E. D. N. Y. 1945), the case which plaintiff's counsel urged upon the District Court in the instant case as controlling (fols. 70-72). In this case Judge Kennedy stated in the very first paragraph of his opinion that "This is an application for a preliminary injunction restraining the defendants against (1) *suffering and permitting 'employees' to produce work at home* without obtaining a special homework certificate * * * ". (Italics added.) It will be noted that the Administrator thus invoked the "suffer or permit to work" clause as applicable to "employees", *once the employer-employee relationship had been established.*

POINT II

The outside tailors are independent contractors and not employees of the defendant under the Fair Labor Standards Act.

The evidence summarized above at pages 5-9 of the petition demonstrates that the outside tailors are remarkably independent with relation to the defendant. The control exercised by the defendant is either non-existent or negligible in matters of (1) supervision, other than to specify the result required, over the manner in which the outside tailors perform their work; (2) hours which they work; (3) relations between the outside tailors and their own employees or partners; (4) relations between the outside tailors and other tailoring establishments for which they work or are free to work while also working for the defendant; and (5) the operation by the outside tailors of their own shops as independent businesses. On the basis of such evidence, the outside tailors must be regarded as independent contractors and not as employees of the defendant. *Texas Co.* v. *Higgins,* 118 F. (2d) 636, 638-639 (C. C. A. 2nd, 1941); *McGowan* v. *Lazeroff,* 148 F. (2d) 512 (C. C. A. 2nd, 1945); *Standard Oil Co.* v. *Glenn,* 52 F. Supp. 755, 757 (W. D. Ky. 1943), aff'd 148 F. (2d) 51 (C. C. A. 6th, 1945); *Biltgen* v. *Reynolds,* 58 F. Supp. 909 (D. Minn. 1943); *Kentucky Cottage Industries* v. *Glenn,* 39 F. Supp. 642, 645 (W. D. Ky. 1941).

We wish to direct the attention of the Court to the fact that the foregoing cases of course involved determinations as to what constituted employer-employee relationships within the intendment of the Social Security Act and for this reason may be said to be distinguishable from the instant case, as pointed out by the District Court below (fols.

2086-2088). As a matter of fact, we fully agree with the District Court that whether an employer-employee relationship within the meaning of the Act exists between the defendant and the outside tailors must be determined "by reference to the terms, history and purposes of the legislation" (fol. 2086). Thus we have endeavored to analyze the legislative history and purpose of the "suffer or permit to work" clause of the Act above at pages 33-36 of this brief, as we did for the benefit of the District Court below (fols. 2161-2162) and in the Circuit Court of Appeals. We cannot believe, however, that Congress intended at the time it enacted the Fair Labor Standards Act to thrust the federal courts upon an uncharted sea in determining who are employees within the meaning of the Act without reference to the decades of tradition which had become part of the common understanding of the people as to what constitutes an employer-employee relationship. We believe that our position in this respect is consistent with the notion of comprehensive coverage of employees contemplated by the Act, as stated by this Court in *United States* v. *Rosenwasser,* 323 U. S. 360, 362 (1945). Commenting upon the *Rosenwasser* case, the Circuit Court of Appeals for the First Circuit stated in *Walling* v. *Portland Terminal Co.,* 155 F. (2d) 215, 218 (C. C. A. 1st, 1946), cert. granted October 14, 1946:

> "And the definition of employees is certainly a very comprehensive definition. United States v. Rosenwasser, 1945, 323 U. S. 360, 362, 65 S. Ct. 295. But we do not believe that Congress intended to give to the term 'employee' the expansive scope that a literal construction of the words 'suffer or permit to work' would compel. We cannot infer that Congress intended the absurdities that such a construction would breed."

We contend simply that the "suffer or permit to work" clause of the Act, rather than being a limitless, catch-all phrase designed to embrace every person who lifts a hand in work, represents instead a carefully considered limitation upon the defenses which an employer may invoke to circumvent the obligations imposed under the Act when the employer-employee relationship is found to exist. To determine whether this relationship does exist, we submit that reference must be made to analogous situations where the existence of the employer-employee relationship has been considered. *Still* v. *Union Circulation Co.*, 101 F. (2d) 11 (C. C. A. 2nd, 1939), cert. den. 308 U. S. 565 (1939); *Debord* v. *Proctor & Gamble Distributing Co.*, 146 F. (2d) 54 (C. C. A. 5th, 1944). The Court of Appeals of New York laid down a test in *Irwin* v. *Klein*, 271 N. Y. 477, 485 (1936), for determining whether an employer-employee or independent contractor relationship exists:

> "An agreement to perform work is not in true sense a contract of employment unless the workman is bound to submit to the will of the person for whom the work is to be done, in regard to all the details of the work. Right to specify the work to be done, even right to require that in specified matters the workman shall submit to the will and directions of the person for whom the work is to be performed, is not sufficient to create the relation of master and servant. So long as the workman retains, even with such limitations, the right to determine the details of the performance of the work, he is rather an independent contractor than a servant, and his work, though performed in furtherance of the 'business' of another person, remains the 'business' of the workman."

The plaintiff has urged that the decision in the instant case should be controlled by *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111 (1944). We respectfully submit that the decision in the *Hearst* case was compelled by the extraordinary degree of control and supervision exercised by the newspapers' district managers over the newsboys. Under these circumstances, this Court was entirely warranted in holding that the protection of the National Labor Relations Act should not be denied because of technical legal classifications, particularly when the Board's findings that the newsboys were employees had sufficient support in the record. It should be noted, however, that the Supreme Court, while recognizing that "Congress had in mind a wider field than the narrow technical legal relation of 'master and servant', as the common law had worked this out in all its variations" observed also that Congress had in mind "at the same time a narrower one than the entire area of rendering service to others". Moreover, in considering whether the *Hearst* case has any application to the instant case, the Court will recall its own admonition, subsequent to the *Hearst* case, in construing the Fair Labor Standards Act in *Armour & Co.* v. *Wantock*, 323 U. S. 126, 132-133 (1944):

> "It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading."

Even under the National Labor Relations Act, where the conception of what constitutes an employee is at least as broad as under the Fair Labor Standards Act, the Board recently held that house-to-house carriers are independent contractors and not employees of the publishers—under circumstances in many respects similar to the relationship between the outside tailors and the defendant in the instant case. *In re Philadelphia Record Company,* 69 NLRB No. 146 (August 6, 1946).

The Fair Labor Standards Act very properly has been construed to embrace within its definition of "employee" persons over whom the employer exercises a high degree of control and supervision or where the employer is in such a superior economic position as to relegate homeworkers to the status of "sweat shop labor" (facts not found in the instant case). *Walling* v. *American Needlecrafts,* 139 F. (2d) 60 (C. C. A. 6th, 1943); *Glenn* v. *Beard,* 141 F. (2d) 376, 377 (C. C. A. 6th, 1944), cert. den. 323 U. S. 724 (1944); *United States* v. *Vogue, Inc.,* 145 F. (2d) 609 (C. C. A. 4th, 1944); *Fleming* v. *Demeritt Co.,* 56 F. Supp. 376 (D. Vt. 1944); *Walling* v. *Wolff,* 65 F. Supp. 532 (E. D. N. Y. 1945).

Moreover, the question of whether an employer-employee relationship exists within the meaning of the Fair Labor Standards Act repeatedly has been determined on the basis of standards well established in law for ascertaining the extent of control exercised by the employer over the independent contractor or employee, as the case may be. *Fleming* v. *Palmer,* 123 F. (2d) 749, 762 (C. C. A. 1st, 1941); *Southern Railway Co.* v. *Black,* 127 F. (2d) 280, 281 (C. C. A. 4th, 1942); *Bowman* v. *Pace Co.,* 119 F. (2d) 858, 860 (C. C. A. 5th, 1941); *Walling* v. *Jacksonville Terminal Co.,* 148 F. (2d) 768, 770 (C. C. A. 5th, 1945).

POINT III

The injunction granted by the District Court and approved by the Circuit Court of Appeals is not sufficiently fair, definite and feasible to permit compliance therewith by the defendant.

Aside from the complete absence of any control by the defendant over the outside tailors (as demonstrated by the evidence which we have summarized above at pages 5-9 of the petition), which alone renders the injunction difficult to comply with, we wish to direct the attention of the Court to the following situations which make the injunction not only difficult to comply with but, in our view, utterly impossible to comply with:

1. The injunction as it now stands requires the defendant to treat as its own employees a number of outside tailors who, in addition to performing work for the defendant, perform work also for other tailoring establishments which are competitors of the defendant.

2. The injunction as it now stands requires the defendant to treat as its own employees a number of outside tailors who not only perform work themselves for the defendant, but also have working for them as their own employees one or more persons who perform work on the defendant's material.

3. The injunction as it now stands requires the defendant to treat as its own employees a number of outside tailors who not only perform work themselves for the defendant, but are in partnership or association with other tailors who also perform work on the defendant's material.

The injunction which has been granted by the District Court in the instant case, as with all injunctions granted by the Federal courts, must meet the requirements of Rule 65(d) of the Federal Rules of Civil Procedure which provides as follows:

> "Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon 'hose persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

Certainly the injunction in the instant case cannot be effectively complied with by the defendant unless it is binding also upon (1) the tailoring establishments other than the defendant for whom the outside tailors work, (2) the employees of the outside tailors who perform work for the defendant, and (3) the partners and associates of the outside tailors who perform work for the defendant. These persons in all fairness must be regarded as "persons in active concert or participation with" the outside tailors. If the outside tailors are to be regarded as employees of the defendant, then the injunction will be binding upon the other persons referred to above, provided they "receive actual notice of the order by personal service or otherwise."

The difficulties, if not the utter impossibility, of making the injunction in the instant case effective, in so far as the defendant's relations with the persons referred to above

are concerned, are innumerable and require little elaboration here.

For example, the outside tailor by the name of Goldberg works for four other people on Fifth Avenue in addition to the defendant (fol. 1212). The outside tailor by the name of Lefkow is one of the defendant's competitors, has his own clientele and his own customers, but nevertheless does work for the defendant (fols. 1169-1170, 1213-1214, 1693). The outside tailor by the name of Dambrso, while working for the defendant, also did work for the defendant's competitors M. Rock and McCord & Mace (fols. 957-1003). The outside tailors solicit work from other tailoring establishments while working for the defendant and are free to do work for other tailoring establishments while working for the defendant (fols. 877-878, 965-966). The outside tailors clearly understand that their relationship with the defendant permits them to work for other tailoring establishments while working for the defendant (fols. 400-401, 511-512, 877-878, 1681-1682).

In view of these facts, the defendant raises the question: Why should these outside tailors be treated as employees of the defendant rather than employees of the competitors of the defendant for which they also work?

The District Court has attempted to minimize the difficulty of this situation by stating in its opinion that "Generally the outside tailors work for defendant exclusively, but in the past a few also worked for others" (fol. 2083). In its Findings of Fact, also, the District Court stated "The majority of the outside tailors have always worked for defendant alone and no other firms. However, in the past, a few also have performed some work for other firms" (fol. 2112). The inaccuracy of the District Court's Findings as to these facts resulted from accepting substantially without change the findings prepared by winning counsel—

a practice which repeatedly has been criticized. *Allen Bradley Co.* v. *Local Union No. 3*, 145 F. (2d) 215, 219 (C. C. A. 2nd, 1944), rev'd on other grounds 325 U. S. 797 (1945), and cases therein cited. Contrary to the District Court's Findings in this respect, the evidence is clear, unequivocal and undisputed that at least two of the outside tailors, Goldberg and Lefkow, are now working for the defendant and simultaneously for other tailoring establishments which are competitors of the defendant (fols. 1170, 1212, 1693). Moreover, we respectfully submit that it makes little difference whether two or sixteen outside tailors do work for tailoring establishments other than the defendant; the important point is that, to that extent, the injunction is unfair in its application to the defendant and not feasible for the defendant to comply with. As we previously have pointed out, the Circuit Court of Appeals for the Sixth Circuit refused to construe as employees under the Fair Labor Standards Act those who not only work for an accused employer but also work for anybody else, since "this would encompass all employed humanity." *Walling* v. *Sanders*, 136 F. (2d) 78, 81 (C. C. A. 6th, 1943).

Moreover, compliance with the injunction granted by the District Court below would give rise to the ludicrous situation, for example, of the defendant with its eight inside employees (fol. 2099) being required to treat as its own employee the outside tailor Goldberg who has fifteen employees working in his shop (fols. 671, 683). To keep books and records with respect to the wages and hours of Goldberg would be impossible without keeping similar accounts for the employees of Goldberg who presumably do most of the work on the defendant's material. In view of these facts, the defendant raises the question: Why should the defendant, rather than Goldberg, be required to keep books and records with respect to the wages and hours of Gold-

berg's employees? Similar difficulties will confront the defendant in endeavoring to keep books and records with respect to the following outside tailors, all of whom either now have employees of their own working for them or have had employees of their own working for them in the past when help was not so scarce as it is today (fols. 510-511): Margolin (fols. 174, 311, 634-644, 622-665); Sansone (fols. 470-471, 504-505); Cipolaro (fol. 872); Lefkow (fols. 1213-1214); Rubin (fols. 1213-1214); Sallen (fols. 1212-1214).

Similar difficulties will confront the defendant in endeavoring to comply with the injunction in so far as it requires the defendant to treat as its own employees those outside tailors who have partners or associates in their shops who also perform work on the defendant's material, such as Stigliani (fols. 1590-1592, 1595-1597, 1629-1632).

We believe that the situations we have just set forth, which stem essentially from the lack of supervision and control by the defendant over the work of the outside tailors, will result in hopeless confusion if the defendant is to be required to comply with the injunction as it now stands. Surely the injunction has not been moulded by the District Court to the particular facts of the defendant's business as disclosed by the record with sufficient care to make it possible for the defendant to carry on its business without unreasonable risk of being subjected to the drastic penalties for contempt, particularly since non-compliance with the injunction as it now stands inevitably will result. The peculiar responsibility which the Fair Labor Standards Act imposes upon a District Court of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations—a responsibility quite different from that assumed by the courts in construing the National Labor Relations Act, the Interstate Commerce Act

and other federal legislation—has been pointed out by this Court in *A. B. Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 523 (1942) and *10 East 40th Street Building Co., Inc.* v. *Callus*, 325 U. S. 578, 579-580 (1945). Moreover, the underlying traditions of equity which should have guided the District Court in moulding the injunction to the peculiar needs of the defendant's business in the instant case, if any injunction at all was warranted, have been stated by this Court in *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329-330 (1944):

> "The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied."

The District Court, in granting the injunction in the instant case, merely signed the decree submitted by the plaintiff, substantially without charge, and totally disregarded the form of decree submitted by the defendant, as well as the proposed modifications of the decree which the defendant urged in its motion to amend the judgment, findings of fact and conclusions of law (fols. 2167-2171).

While we firmly believe that the judgment below should be reversed and the complaint dismissed, we nevertheless shall respectfully request this Court, in the event certiorari should be granted, if the injunction is to be permitted to stand in any form, to modify it in such a manner as to ren-

der it sufficiently fair, definite and feasible to permit compliance therewith by the defendant. This Court has the power to so modify the decree. *Hartford-Empire Co.* v. *United States,* 324 U. S. 570, 571 (1945).

POINT IV

The District Court erred at the trial in refusing to make available to the defendant the statement given to the plaintiff by the witness Margolin and the Circuit Court of Appeals erred in holding the error of the District Court to be harmless.

The witness Margolin testified that he gave to representatives of the plaintiff a signed statement relating to the instant case (fols. 1909-1910). In response to the trial court's inquiry as to whether the Margolin statement was in the possession of the plaintiff at the time of the trial, counsel for the plaintiff replied in the affirmative (fol. 1911) but objected to the production of the statement for inspection by the defendant's counsel (fol. 1912). The trial court sustained the plaintiff's objection on the ground that "the Government may be protecting the man who made the statement. Therefore it may be regarded as something which should be held secret and confidential" (1922). The trial court, however, did not examine the Margolin statement to determine whether it was of a secret and confidential nature, but merely accepted the conclusion of the plaintiff's counsel in this respect. The defendant duly excepted to the trial court's ruling (fol. 1925).

In the Circuit Court of Appeals, we contended that the refusal of the District Court to permit the defendant to examine the Margolin statement constituted prejudicial er-

ror. The plaintiff, in his brief filed in the Circuit Court of Appeals, conceded that "As to the Margolin statement, presumably it could have been used to impeach the witness' credibility" and "the statement conceivably might have contained some adverse information bearing on the relationship between the witness and appellant" (Plaintiff's Brief, p. 22). We regard these concesssions on the part of the plaintiff as significant, particularly since the Margolin statement is in the hands of the plaintiff only and never has been seen by the Circuit Court of Appeals, the District Court or by the defendant (fols. 1909-1925), in view of the ruling by the District Court that the Margolin statement should be regarded "as something which should be held secret and confidential" (fol. 1922). As the Circuit Court of appeals below stated in *Hoffman* v. *Palmer,* 129 F. (2d) 976, 997 (C. C. A. 2nd, 1942), aff'd sub nom *Palmer* v. *Hoffman,* 318 U. S. 109 (1943), the trial judge "should have dealt with the request as if it had arisen under Federal Rules of Civil Procedure, rule 26 (b)". Claims of privilege similar to that asserted by the plaintiff in the instant case with respect to the Margolin statement have been overruled.

In *Fleming* v. *Bernardi,* 4 F. R. D. 270, 271 (N. D. Ohio, 1941), the court stated, in overruling the Administrator's objection to disclosing information in his files alleged to be confidential:

> "If this were a suit between private parties, and a subpoena were issued to the Administrator to produce his files, he might very well decline under the law which protects privileged documents. The 'leading English case' which plaintiff relies on (Smith v. The East India Co., 1 Ph. 50, 41 Reprint 550 (1841)) states that communications should be protected from disclosure 'at

the suit of a particular individual'. But this suit is not between private parties. Here the Administrator is himself the plaintiff and seeks a decree of this court. It seems that when a party seeks relief in a court of law, he must be held to have waived any privilege, which he otherwise might have had, to withhold testimony required by the rules of pleading or evidence as a basis for such relief.

* * * * *

The Administrator may well keep secret all communications until he takes action in court based upon such information; but then he must disclose such information if it is required by the rules of criminal or civil procedure as a foundation for such action."

Likewise in *Walling* v. *Richmond Screw Anchor Co.*, 4 F. R. D. 265, 269 (E. D. N. Y. 1943), Judge Moscowitz stated the rule relating to the alleged confidential character of the Administrator's files when he comes into court as a litigant:

"The United States Government is in no different position than any ordinary litigant and is, therefore, bound by the Rules of Civil Procedure in the same respects as an ordinary litigant. See Fleming v. Bernardi, D. C., 1 F. R. D. 624.

* * * * *

This Court refuses to go so far as to decide that any and all records of a governmental agency are of a confidential nature and therefore privileged. It may very well be that in a proper case the Court would direct a governmental agency to disclose a record in

its possession. The record must really be of a confidential nature, it cannot be merely thought to be such. The claim that it is of a confidential character cannot be fancied, it must be of substance and cannot be based on whim or caprice. The Court is not bound by the claim of privilege unless in fact the records are of a confidential nature or might prove prejudicial to the Government or to the public interest. Then and then only are they privileged."

Judge Bright followed this same rule in *Bowles* v. *Ackerman,* 4 F. R. D. 260, 262 (S. D. N. Y. 1945):

> "When the plaintiff saw fit to submit himself to the jurisdiction of this court, which he did by the bringing of this action, he at the same time became amenable to the rules of Civil Procedure which, 'govern the procedure in the district courts of the United States in all suits of a civil nature.' Rule 1."

Moreover, the Circuit Court of Appeals below in *United States* v. *Andolschek,* 142 F. (2d) 503, 506 (C. C. A. 2d, 1944), laid down the same rule with respect to the right of a department of the Government to suppress documents of an alleged confidential character when that department of the Government comes into court as a litigant:

> "While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the

> prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully."

While the *Andolschek* case, of course, involved a criminal prosecution, we urged that the rule above set forth applies with even greater force to the case at bar.

In attempting to justify his refusal to produce the Margolin statement, the plaintiff relied upon a statute and certain regulations of the United States Department of Labor. A similar effort on the part of the Government to rely upon a statute and regulations with reference to O. P. A. records, on the basis of which the Government contended that the records were inadmissible because confidential, was rejected by the Circuit Court of Appeals below in *United States* v. *Beekman,* 155 F. (2d) 580, 584 (C. C. A. 2nd, 1946):

> "We accept neither of those reasons. It needs no lively imagination to perceive that persons who have been disciplined by such a government agency, and who are still in a business subject to its supervision, might be facile witnesses against other alleged offenders. Consequently, records which show that they had thus been disciplined bear importantly on their bias. It follows that such evidence is admissible, not 'collateral.' Wigmore, Evidence, §§1020, 1022. We have recently held that when the government institutes criminal proceedings in which evidence, otherwise privileged under a statute or regulation, becomes importantly relevant, it abandons the privilege. United

States v. Andolschek, 2 Cir., 142 F. 2d 503; cf. United States v. Krulewitch, 2 Cir., 145 F. 2d 76, 156 A. L. R. 337.

Accordingly, the trial judge should have read the records to determine whether they contained data showing previous disciplining of these witnesses. The ruling in United States v. Ebeling, 2 Cir., 146 F. 2d 254, 256, 257, is not applicable; for here defendants' counsel could not ask that the documents be sealed and made part of the record for appeal purposes, since the trial judge held they need not be produced in court. As these four witnesses gave important testimony affecting the charges under counts 1, 2, 3, 5, 6, 11 and 12, the convictions on those counts cannot stand."

Since the Margolin statement was not submitted to the defendant's counsel for inspection, nor indeed was it submitted to the trial court for examination, we do not know what the contents of the Margolin statement may have been. The plaintiff, however, has conceded its relevancy with respect to the issue of Margolin's credibility and the issue of the relationship between the outside tailors and the defendant. Accordingly, we regard the suppression of the Margolin statement at the trial as distinctly unfair to the defendant. Margolin after all was the plaintiff's principal witness. He testified at far greater length than any of the other witnesses. While his credibility was a matter of sharp dispute, he nevertheless gave testimony which indicated that he, as well as other outside tailors similarly situated, was operating his own independent tailoring establishment, in the conduct of which he kept his own books and records and incurred business expenses in excess of $500 annually, for which he was allowed deductions on his Federal income tax returns (fols. 285, 648-660, 1886-1905; Ex. C-2).

Moreover, it was the contention of the plaintiff at the trial, and the District Court and Circuit Court of Appeals now have held, that Margolin is an employee of the defendant. While we do not agree with this conclusion, we do contend that if Margolin is to be regarded as an employee of the defendant, surely the defendant as his employer should have been entitled at the trial of this case to have examined a statement given by one of its own alleged employees to the plaintiff in preparation for trial.

The Circuit Court of Appeals below (Opinion, p. 641) recognized the error committed by the District Court in the exclusion of the Margolin statement and held that the doctrine of *United States* v. *Andolschek,* 142 F. (2d) 503 (C. C. A. 2d, 1944) and *United States* v. *Beekman,* 155 F. (2d) 580 (C. C. A. 2d, 1946), applies in civil as well as in criminal cases. The Circuit Court of Appeals below held, however, that the error was harmless, since the facts to which Margolin testified, so far as relevant, were not in dispute. We believe that even a cursory examination of the testimony of Margolin in this case will disclose that the facts to which he testified were sharply in dispute and the issue of Margolin's credibility was one of the critical issues in the case.

We regard as serious error the practice of the District Court as sanctioned by the Circuit Court of Appeals below, in permitting the Administrator at the time of trial, relying upon the alleged secret and confidential character of a signed statement procured from its principal witness prior to trial, to withhold that statement from the defendant's use in cross-examining that witness, despite the Administrator's concession that the statement was relevant upon the issue of the witness' credibility and the issue of the relationship between the outside tailors and the defendant. In any event, it certainly does not appear beyond

doubt that the error in the exclusion of the Margolin statement did not and could not have prejudiced the rights of the defendant. *Deery* v. *Cray,* 5 Wall. 795, 807-808 (1866); *Vicksburg & Meridian Railroad* v. *O'Brien,* 119 U. S. 99, 103 (1886); *United States* v. *River Rouge Improvement Co.,* 269 U. S. 411, 421 (1926); *Williams* v. *Great Southern Lumber Company,* 277 U. S. 19, 26 (1928); *McCandless* v. *United States,* 298 U. S. 342, 347-348 (1936). Accordingly, we respectfully submit that this departure by the District Court so far from the accepted and usual course of judicial proceedings, as sanctioned by the Circuit Court of Appeals below, is such as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the reasons stated in the petition and in this brief, and particularly since this case involves substantial questions of Federal law which should be reviewed by this Court, a writ of certiorari should be issued for that purpose as requested in the foregoing petition.

Dated: New York, N. Y., February 4, 1947.

Respectfully submitted,

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